No. 93-805

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

CHRISTOPHER WOLSKY,

Petitioner,

v.

MEDICAL COLLEGE OF HAMPTON ROADS,
formerly known as Eastern Virginia Medical Authority,
formerly known as Norfolk Area
Medical Center Authority,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit was correct in applying the one year statute of limitations set forth in the Virginia Rights of Persons With Disabilities Act, Va. Code Ann. §51.5-46(b) (1985), as amended, which is the precise state law counterpart to §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1986), as the most appropriate or analogous state statute of limitations for Plaintiff's claim arising under the Rehabilitation Act.

Whether this matter, which presents the Court with an issue which can arise only in the Commonwealth of Virginia and the State of Hawaii, implicates federal questions of uniformity and certainty.

LIST OF THE PARTIES

The parties set forth in the caption are the only parties to this action.

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OPINIONS BELOW

The decision and opinion of the United States Court of Appeals for the Fourth Circuit is reported at 1 F.3d 322 and is included in the Appendix to the Petition for Writ of Certiorari. The opinion of the United States District Court for the Eastern District of Virginia is reported at 795 F. Supp. 171.

JURISDICTION

The statement of the grounds upon which the jurisdiction of this Court is sought is correctly presented in the Petition for Writ of Certiorari.

STATUTES

Civil Rights Act of 1871, 42 U.S.C. §1981 (1988)

Civil Rights Act of 1871, 42 U.S.C. §1983 (1988)

Rehabilitation Act of 1973, 29 U.S.C. §794 (1986)

Virginia Rights Of Persons With Disabilities Act, Va. Code Ann. §51.5-46 (1990)

Va. Code Ann. §8.01-243 (1987)

Hawaii Rev. Stat. §368-1.5 (1989)
set forth in the Supplemental Appendix

STATEMENT OF CASE

As set forth in the Complaint, Petitioner alleges that he suffers from a condition referred to as "Panic Disorder." Petitioner claims that he was discriminated against on the basis of his alleged disability, and that such discrimination resulted in his dismissal from Respondent Medical College of Hampton Roads (hereinafter referred to as "Respondent" or "the School") on or about May, 1990. Petitioner further alleges that he was subsequently denied readmission to the School in August, 1990 and February, 1991. Accordingly, as set forth in the Complaint, the final allegedly discriminatory act taken by the School occurred on or about February, 1991, approximately fourteen months prior to Petitioner's filing of the Complaint in this matter on or about April 23, 1992.

Respondent moved the District Court, in relevant part, to dismiss Petitioner's claim under §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1986) ("section 504" or "the Rehabilitation Act"), as set forth in Count I of the Complaint, on the grounds that such claim is barred by the one year statute of limitations contained in the Virginia Rights Of Persons With Disabilities Act, Va. Code Ann. §51.5-46 (1990) ("Virginia Disabilities Act"). The District Court denied the School's

Motion on the grounds that the limitations period set forth in the Virginia Disabilities Act was inapplicable. The District Court therefore found Petitioner's Complaint to have been timely filed under the two year statute of limitations applicable to personal injury actions in Virginia, Va. Code Ann. §8.01-243(A) (1985).

Respondent filed an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit, based upon the failure of the District Court to apply the most appropriate and analogous state statute of limitations to Petitioner's claim under section 504. The Appellate Court reversed the District Court's decision in accordance with this Court's mandate that, in the absence of a statutory limitations period, the court should select the most appropriate or analogous state statute of limitations to apply. *Wilson v. Garcia*, 471 U.S. 261, 268 (1984). The Fourth Circuit found that the Virginia Disabilities Act, which is modeled explicitly upon the Rehabilitation Act, was the precise counterpart for Petitioner's claim arising in the Commonwealth of Virginia. The Fourth Circuit therefore directed the District Court to dismiss Count I of Petitioner's Complaint as time-barred by the one year limitations period set forth in the Virginia Disabilities Act.

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be denied. The Fourth Circuit Court of Appeals followed this Court's directive in *Wilson* in determining that the Virginia Disabilities Act, modeled explicitly after the Rehabilitation Act, was the precise counterpart to the Rehabilitation Act, and was therefore the state statute most analogous to the Act for the purpose of determining the appropriate limitations period. The Fourth Circuit correctly distinguished the issue in the instant case from that addressed by other circuits which have applied state personal injury limitations periods to Rehabilitation Act

claims, on the ground that those courts were not presented with the opportunity to apply a state statute which is the precise counterpart to the Rehabilitation Act.

In accordance with *Wilson*, there is no conflict between the circuits as to the test to be used in determining the most appropriate or most analogous limitations period. Because it was presented with the precise counterpart, there was no need for the Fourth Circuit to "characterize" the Rehabilitation Act to determine the most analogous state statute. Further, the issue presented to the Court is one of interest only to residents of Virginia (and arguably Hawaii), given the unique nature of the Virginia Disabilities Act among state statutes prohibiting discrimination against individuals with disabilities. Moreover, a one year limitations period for claims under the Rehabilitation Act does not conflict with federal interests.

ARGUMENT – REASONS FOR DENYING PETITION

A. The Fourth Circuit Was Correct In Determining That The Virginia Disabilities Act Is The Most Analogous State Statute To Section 504 Of The Rehabilitation Act

It is beyond dispute that, in the absence of a limitations period contained in a federal statute (as is the case with the Rehabilitation Act), "the central issue [to be addressed by the courts is] the 'selection of the most appropriate or the most analogous state statute of limitations to apply.' " *Wolsky v. Medical College of Hampton Roads*, 1 F.3d 222, 223 (4th Cir. 1993) *citing Wilson*, 471 U.S. at 268. The "most analogous" or "most appropriate" test is the direct progeny of this Court's decision in *O'Sullivan v. Felix*, 233 U.S. 318 (1914), in which the Court held that in the absence of a statutory limitations period, the applicable limitations period to be applied by the federal court is that which the state itself would

enforce had an action seeking similar relief been brought in a court of that state.

The guidelines set forth in *O'Sullivan* were more recently applied by this Court in *International Union, United Automobile Workers of America v. Hoosier Cardinal Corp.*, 383 U.S. 696, 704-706 (1966), in which this Court found that a court seeking to apply a limitations period to a federal claim must initially review state law to determine if there exists an exact counterpart to the federal claim at issue. *See also*, *Runyon v. McClary*, 427 U.S. 160, 180 (1976) (In seeking the applicable state limitations period for a claim under §1981, the Court noted: "At the time of this litigation Virginia had not enacted a statute that specifically governed civil rights suits").

In the instant case, the Fourth Circuit explicitly followed the directive of this Court in seeking the "most appropriate" or "most analogous" statute in the Commonwealth of Virginia to be applied to the Petitioner's claim under Section 504. *Wolsky*, 1 F.3d at 223. The means employed by the Fourth Circuit in reaching the decision in this case was therefore absolutely consistent with *Wilson*, *Goodman* and those Circuit court decisions referenced in Petitioner's Writ.

In the instant case, however, unlike the cases cited in Petitioner's Writ, the Fourth Circuit was presented with the Virginia Disabilities Act, which is the precise analogy to the Rehabilitation Act. Accordingly, there was no need for the court to "characterize" the Rehabilitation Act in order to find an analogous state statute from which to borrow a limitations period. In arguing that the Appellate Court wrongly applied *Wilson*, Petitioner apparently ignores this Court's guidance that "[Section 1983] can have no *precise counterpart* in state law." *Wilson*, 471 U.S. at 272 (emphasis added). This finding is a clear indication that, in seeking the most appropriate or analogous state limitations period, a court must first seek a "precise counterpart" in state law before resorting to "characterizing" the claim. In accordance with this

Court's decisions in *Wilson*, *Hoosier Cardinal*, and *O'Sullivan*, the Fourth Circuit sought, and found, the precise counterpart to the Rehabilitation Act under Virginia law. The court therefore had no need to resort to "characterizing" the Rehabilitation Act, which could have led to the court utilizing a less analogous limitations period than that provided by the Virginia Disabilities Act.

B. No Other Court Of Appeal Has Addressed The Applicability Of A State Statute Which Is The Precise Counterpart To Section 504

Petitioner's reliance on the decisions of the Second, Fifth, Sixth, Seventh and Tenth Circuit Courts of Appeal, each applying the applicable state's personal injury limitations period to a claim under the Rehabilitation Act, is flawed.[1] Neither the above-referenced Courts of Appeal, nor any other court other than the Fourth Circuit, has considered (or arguably could consider) the application of a state statute which is indisputably the precise analogy to the Rehabilitation Act.

A further flaw in Petitioner's Petition for Writ of Certiorari was succinctly stated by the Fourth Circuit Court of Appeals: "[T]he statute at issue in the instant case is neither section 1981 nor section 1983, but section 504 of the Rehabilitation Act." *Wolsky v. Medical College of Hampton Roads*, 1 F.3d at 223 (4th Cir. 1993).

Specifically, in applying state limitations periods for personal injury actions to claims brought under the Reconstruction Era Acts (referring to §§ 1981 and 1983

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1. As noted, the Virginia Disabilities Act parallels the Rehabilitation Act in specifically prohibiting discrimination against disabled persons by recipients of state/federal funding respectively. Petitioner does not, and could not, argue that any other federal Appellate Court has been presented with such a precisely analogous state statute in determining the most appropriate state statute from which to derive a statute of limitations for a claim under the Rehabilitation Act.

of the Civil Rights Act of 1871 *see Goodman*, *supra* and *Wilson*, *supra* respectively), the Supreme Court has recognized the unique and "federal" nature of such claims. In fact, the Supreme Court has held that "[Section 1983] can have no precise counterpart in state law. . . ." *Wilson*, 471 U.S. at 272. *See also Burnett v. Grattan*, 468 U.S. 42, 49 (1984) ("[The Supreme Court has emphasized] the independence of the remedial scheme established by the Reconstruction Era Acts").

The distinction between the Reconstruction Era Acts (§§1981 and 1983) and the Rehabilitation Act is readily apparent. The Reconstruction Era Acts were specifically designed to supersede the laws of the Reconstruction-era South, which were recognized as being ineffective with respect to civil rights violations against citizens being denied their basic civil and political rights. *See Wilson*, 471 U.S. at 276. The *Wilson* Court held: "It was the very ineffectiveness of state remedies [for the denial of civil and political rights following the Civil War] that led Congress to enact the Civil Rights Acts in the first place." *Wilson*, 471 U.S. at 279. In recognition of the uniquely federal nature of the Reconstruction Era Acts, the *Burnett* Court found that a state law is not "appropriate if it fails to take into account the . . . policies that are analogous to the goals of the Civil Rights Acts." *Burnett*, 468 U.S. at 50.

In contrast to the extraordinary breadth of the Reconstruction Era Acts, the Rehabilitation Act is a recent, narrowly defined statute, directed solely at eliminating discrimination against individuals with handicaps by recipients of federal funding. *Contrast*, *Wilson*, 471 U.S. at 272 ("The high purposes of [the] unique remedy [afforded by §1983] make it appropriate to accord the statute a sweep as broad as its language"). Moreover, unlike the Reconstruction Era Acts, the very nature and purpose of §504 does not inherently prohibit a state from drafting a precise counterpart to it. (*Compare Wilson*, 471 U.S. at 273-74).

In the instant case, of course, the Virginia Disabilities Act, alone among state statutes other than Hawaii,[2] presents this Court with a single, comprehensive state statute explicitly drafted to mirror the policies and goals of §504. The utilization of the one year limitations period set forth therein is "consistent with the assumption that Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task . . . ." *Wilson*, 471 U.S. at 275.

C. The One Year Limitations Period Of The Virginia Disabilities Act Does Not Undermine Federal Policy

The general rule that federal courts look to state law in the absence of a federal statutory limitations period is qualified only by the exception that the applicable state limitations period must not undermine federal policy. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). In the instant case, the one year statute of limitations provided by the Virginia Disabilities Act allows a potential plaintiff more time to bring an action than does the 180/300 day limitations period for discrimination claims brought under Title VII, 29 U.S.C. §2000 *et. seq.*[3]

Moreover, it is significant to note that in *Hall v. Knott County Board of Education*, 941 F.2d 402 (6th Cir. 1991), the Sixth Circuit Court of Appeals found Kentucky's one year statute of limitations for personal injury actions to be applicable to claims brought in the Commonwealth under §504. *Hall*, 941 at 408.

It is clear, therefore, that the one year limitations period of the Virginia Disabilities Act does not undermine, and is not inconsistent with, federal policy in providing a limitations period for claims under the Rehabilitation Act brought in the Commonwealth of Virginia.

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2. *See* Haw. Rev. Stat. §368-1.5 (1989).

3. The 180/300 day limitations period is applied only to the initiation of claims before the Equal Employee Opportunity Commission ("EEOC"). A party has only 90 days from the receipt of a determination from the EEOC to bring a cause of action in federal court.

CONCLUSION

For the reasons set forth above, Respondent Medical College of Hampton Roads respectfully submits that the Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

HAWAII REVISED STATUTES ANNOTATED
TITLE 20. SOCIAL SERVICES
[CHAPTER 368]. CIVIL RIGHTS COMMISSION
PART I. GENERAL PROVISIONS
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Current through Act 8 of the 1st Spec. Sess.
of the 17th Legislature

§ 368-1.5 Programs and activities receiving state financial assistance.

(a) No otherwise qualified individual in the state shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination by State agencies, or under any program or activity receiving State financial assistance.

(b) As used in this section, the term "disability" means the state of having a physical or mental impairment which substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment.

(c) As used in this section, "State financial assistance" means grants, purchase-of-service contracts, or any other arrangement by which the State provides or otherwise makes available assistance in the form of funds to an entity for the purpose of rendering services on behalf of the State. It does not include procurement contracts, state insurance or guaranty contracts, licenses, tax credits, or loan guarantees to private businesses of general concern that do not render services on behalf of the State.